

REMARKS

Reconsideration and withdrawal of the rejection and the allowance of all claims now pending in the above-identified patent application (*i.e.*, Claims 44-68) are respectfully requested in view of the foregoing amendments and the following remarks.

At the outset, Applicant wishes to thank the Examiner for the indicated allowability of the subject matter of dependent Claims 32, 33 and 36-38 as part of the first Office Action.

As part of the claim amendments being entered at this time, Applicant has proceeded to cancel prior Claims 23-43 and has presented new Claims 44-50, which are submitted to recite subject matter indicated to be allowable by the Examiner. Specifically, Claim 44 recites the subject matter of dependent Claim 32 in independent form, while independent Claim 48 presents the subject matter of dependent Claim 36. New dependent Claims 45-47 are dependent upon independent Claim 44, while new dependent Claims 49 and 50 depend from independent Claim 48.

New Claims 44-50 have also been drafted to avoid the claim language that the Examiner deemed to be indefinite and which formed the basis of the Examiner's 35 U.S.C. §112, second paragraph, indefiniteness rejection.

Inasmuch as new Claims 44-50 recite the subject matter that the Examiner has indicated to be allowable over the prior art (and have been drafted to avoid the language held to be indefinite by the Examiner), it is respectfully submitted that Claims 44-50 are

in condition for allowance at this time and should now be allowed.

Additionally, Applicant has also entered new Claims 51-68 his patent application, which has been copied from Claims 1-18, as patented by Lombardi, U.S. Patent No. 7,365,258 B1, issued April 29, 2008, for the purpose of provoking an interference proceeding. There being no pre-issuance publication of the patent application that issued as U.S. Patent No. 7,365,258, it is respectfully submitted that Applicant's copying of the claims patented by Lombardi is timely, as required by 35 U.S.C. §135(b). *See, Ex parte McGrew*, 41 USPQ2d 2004 (PTO Bd. Pat. App. & Int. 1995), *aff'd In re McGrew*, 120 F.3d 1236, 43 USPQ2d 1632 (Fed. Cir. 1997).

It is respectfully submitted that Applicant's disclosure adequately supports the subject matter of Claims 1-18, as patented in Lombardi, U.S. Patent No. 7,365,258, as herein presented, as required by 35 U.S.C. §112, first paragraph, when such claims are given their broadest reasonable interpretation. *See, DeGeorge v. Bernier*, 768 F.2d 1318, 226 USPQ 758, 761-762 (Fed. Cir. 1985) ("the broadest interpretation is always applicable so long as it is reasonable").

By way of example only, Claim 1 of U.S. Patent No. 7,365,258 reads as follows:

1. A percussion assembly including a sound box having upright walls, a seat top, and an interior, the assembly comprising:

a) a beater located in the box interior,

b) and means to activate the beater to repeatedly beat against a surface of a wall at said interior, said means including a cable outside the box and

extending toward a box wall, the cable operatively connected to the beater in the box.

Applicant's *Specification* discloses a "drum," which is a "percussion" assembly, that includes a "resonant chamber" (Applicant's *Specification* at Page 2, lines 3-5), that is analogous to the "sound box" of Lombardi, U.S. Patent No. 7,365,258, which may include a "seat," as taught by Applicant's *Specification* at Page 1, lines 6-11. Applicant teaches the use of a "drum stick mounted within the chamber and adapted for movement to be able to selectively strike the inner surface of the drum which is struck by the player" (as explained by Applicant's *Specification* at Page 2, lines 9-12), which is analogous to the limitation of Claim 1 of Lombardi, U.S. Patent No. 7,365,258, which reads:

"a) a beater located in the box interior."

Applicant's *Abstract* reads as follows:

A drum having a resonant chamber for producing a range of sounds and at least one device for allowing the sound so produced to be altered, which includes a plurality of internal snares which can be brought into contact with the internal surface of the external surface of the resonant chamber which is struck by the player. The drum may also include a bass drum stick mounted within the chamber and adapted for movement to be able to selectively strike the inner surface of the drum which is struck by the player. The bass drum stick may include a pedal, or other device, operable by the player and external to the drum for effecting movement of the bass drum stick.

Applicant's *Abstract* teaches that "a plurality of internal snares which can be brought into contact with the internal surface of the external surface of the resonant chamber which is struck by the player." This disclosure (and Applicant's patent application, generally) supports the limitation of Claim 1 of Lombardi, U.S. Patent No. 7,365,258, that reads:

“b) and means to activate the beater to repeatedly beat against a surface of a wall of said interior [of the sound box].” Applicant’s disclosure of “internal snares” can be “wires” (denoted by reference numeral “20” in Applicant’s drawing figures), which are submitted to meet the limitation of including “a cable outside the [sound] box and extending toward a box wall, the cable operatively connected to the beater in the box,” thereby supporting all limitations recited in independent Claim 1 of Lombardi, U.S. Patent No. 7,365,258.

Applicant’s patent application is a U.S. National Phase application of P.C.T. Application No. PCT/AU2005/000757, filed May 27, 2005, pursuant to 35 U.S.C. §371, which claims foreign priority on the basis of a corresponding patent application filed in Australia on May 27, 2004, thereby providing Applicant with this priority date as his effective filing date. Lombardi recites a United States filing date of August 2, 2006, and would appear to claim neither foreign nor domestic priority.

Thus, if the subject matter of Claims 1-18 of U.S. Patent No. 7,365,258 is patentable to Lombardi, then Applicant respectfully submits that the subject matter of these claims is, likewise, patentable for him.

Incorporation by Reference: It is Applicant’s intent to copy Claims 1-18 of Lombardi, U.S. Patent No. 7,365,258. While care has been taken to ensure that each of the foregoing claims has been properly and correctly copied, in the event that a substantive and unintentional typographical error has been committed in the copying of the foregoing claims, Applicant hereby states that the corresponding claim(s) in Lombardi, U.S. Patent No. 7,365,258, are hereby incorporated by reference into the instant appli-

cation to the extent necessary to account for any possible typographical error. *See, In re Goodwin*, 43 USPQ2d 1856 (PTO Comm. 1997).

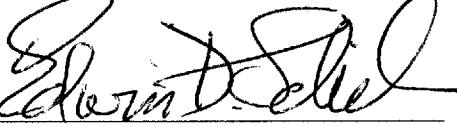
Finally, the instant patent application now contains of 25 total claims of which nine claims are presented in independent form (*i.e.*, Claims 44, 48, 51, 53, 60, 61, 62, 64 and 68.) The originally-paid U.S. National Fee covered three independent claims and a total of 21 claims. Hence, the additional claims fee for six additional independent claims (\$110/independent claim in excess of three) and four additional claims beyond the 21 claims covered by the originally filing fee (\$26/excess claim) is being remitted herewith and totals \$764.

In view of the foregoing, it is respectfully contended that all claims now pending in the above-identified patent application (*i.e.*, Claims 44-68) recite a novel drum, which is patentably distinguishable over the prior art. Accordingly, withdrawal of the outstanding rejection and the allowance of all claims now pending are respectfully requested and earnestly solicited.

The declaration of an interference proceeding with the conflicting claims patented by Lombardi, U.S. Patent No. 7,365,258 is also being respectfully requested.

Respectfully submitted,

MARK WILLIAM ASPLAND

By 
Edwin D. Schindler
Attorney for Applicant
Reg. No. 31,459

PTO Customer No. 60333

Five Hirsch Avenue
P. O. Box 966
Coram, New York 11727-0966

(631)474-5373

March 3, 2009

Enc.: EFT for \$764.00 (Additional Claims Fee)

The Commissioner for Patents is hereby authorized to charge the Deposit Account of Applicant's Attorney (*Account No. 19-0450*) for any fees or costs pertaining to the prosecution of the above-identified patent application, but which have not otherwise been provided for.